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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 435

CONTINENTAL CASUALTY COMPANY,
Petitioner,

versus

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT,

And

BRIEF IN SUPPORT THEREOF.

PURNELL M. MILNER,
Attorney for Petitioner.

Montgomery-Andree Printing Co., Inc., 430-32 Chartres, N. O., La.

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SUPREME COURT OF THE UNITED STATES

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No.

CONTINENTAL CASUALTY COMPANY,
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versus

UNITED STATES OF AMERICA,
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PETITION
FOR REVIEW ON A WRIT OF CERTIORARI OF A DECISION OF THE CIRCUIT COURT OF APPEALS, FIFTH CIRCUIT.

To the Honorable Charles Evans Hughes, Chief Justice, and Associate Justices of the Supreme Court of the United States:

The petition of the Continental Casualty Company brings this its application for Review by Writ of Certiorari of a Decision of the United States Circuit Court of Appeals, Fifth Circuit, in the above entitled cause, and with respect shows:

1.

That this is a case of a Surety on the Bond of a Government Contractor, under the Heard Act, ready and

willing and anxious to comply with its obligation to the United States, because when called upon to complete the contract according to its terms, agreed to do so by letter to the Administrative officer, March 28, 1934, as acknowledged by him April 3, 1934, and only refused to complete the work when the Administrative officer violated the agreement by refusing to make monthly progress payments according to the contract, having complied fully with its other obligations to laborers, subcontractors, and material furnishers by having paid in full, as shown by the Record 43-44-45-46, $37,470.61 to said laborers and material furnishers, the Surety being prevented from completing the defaulted contract for the United States after same was awarded to it, by the wrongful action of the Administrative officer, Lt. Col. J. N. Hodges, refusing to comply with the terms of the contract by making monthly progress payments, required by Art. 16 of the contract, under the following circumstances:

1.

The Grasser Contracting Co., on Nov. 17, 1932, as Principal, with the Continental Casualty Company as Surety, under $155,400 Bond, entered into contract with the United States of America for the construction of six items of Levees, handling 3,585,000 cubic yards of earth.

2.

Grasser Contracting Co. went into bankruptcy March 16, 1934, leaving 1,002,000 cubic yards to be done.

3.

Art. IX of the contract provided for such default as follows:

> "Article 9—Delays—Damages. If the Contractor refuses or fails to prosecute the work or any

separable part thereof, with such diligence as will insure its completion within the time specified in Article 1, or any extension thereof, or fails to complete said work within such time, the Government may, by written notice to the Contractor, terminate his right to proceed with the work or such part of the work as to which there has been delay. *In such event, the Government may take over the work and prosecute the same to completion by contract or otherwise,* and the Contractor and *his sureties shall be liable* to the Government for *any excess cost occasioned* the Government thereby. If the Contractor's right to proceed is so terminated, the Government may take possession of and utilize in completing the work such materials, appliances and plant as may be on the site of the work and necessary therefor."

4.

Petitioner shows that the United States did not avail itself of its options as expressed in Article IX, of either completing the work itself or by sub-contract, in which event the Surety's liability would have been fixed, but by way of minimizing damages, Lt. Col. J. N. Hodges, Administrative officer, on March 17, 1934, notified the Continental Casualty Company of the bankruptcy and default of the Grasser Contracting Co. and said "It is essential that the work be now completed at the earliest practicable date. You are therefore requested to state whether or not you, as Surety, desire to complete the work in accordance with the terms of the Contract". (R. 60).

5.

Art. 16 of the contract provided for monthly progress payments, which had been paid by the United States to the Grasser Contracting Co. under this Article under the contract.

6.

The Continental Casualty Company, by telegram and letter dated March 22, 1934, notified Lt. Col. Hodges "it desired to complete the contract in accordance with the terms of the contract and will proceed at the earliest possible time providing all necessary legal steps have been taken by the Government to cancel and annul the Grasser contract. We are confirming by letter".

7.

March 26, 1934, Lt. Col. Hodges notified Continental Casualty Co. that he *now* enclosed copy of "notice terminating contractor's right to proceed" (R. 63-64) and said: "It is the view of this office that this constitutes the only action necessary in the premises".

8.

March 28, 1934, by letter Continental Casualty Co. *accepted* this statement as constituting only action required of the Government, but suggested that that notice *be served* on Trustee in Bankruptcy (R. 64-65), which suggestion Lt. Col. Hodges complied with March 31, 1934 (R. 65-66), saying: "(d) The Continental Casualty Company, by telegram and letter confirmation, both dated March 22, 1934, signified its desire to complete the work in accordance with the terms of the contract and stated that it would proceed at the earliest possible time provided all necessary legal steps had been or would be taken by the Government to cancel or annul the contract with the Grasser Contracting Company", and, "(e) The Continental Casualty Company, by letter dated March 26, 1934, was informed that the action taken by this office on March 17, 1934, wherein the

contractor was officially placed in default and its right to proceed with the work remaining to be done under the contract was terminated, was considered to be the only action necessary in the premises".

9.

April 3, 1934, in letter to P. M. Milner (R. 68), Lt. Col. J. N. Hodges said "the Continental Casualty Company *has signified its intention to complete the work in accordance with the terms of the contract*".

10.

Petitioner shows that this case involves no disputed fact, as found by the United States Circuit Court of Appeals, Fifth Circuit, and because as shown by the Stipulation (R. 52) of the Attorneys (R. 52-53-54-55-56-57) the case was to be tried *on these facts*, and particularly because the United States attorney corrected his wrongful allegation, Art. XI of the petition (R. 6) by Art. 9 of Stipulation, by which, to correct same, he agreed to *offer*, *produce* and *file* the letters above referred to.

11.

Petitioner respectfully shows that these letters evidence a binding, legal contract between the United States and the Continental Casualty Co. for the latter to complete the work for 8 cents a cubic yard (price of original contract), subject to monthly progress payments, known in Louisiana Law, Civil Code Art. 1768, as a commutative contract in which "what is done, given or promised by one party, is equivalent to, or a consideration of what is done, given or promised by the other".

12.

Petitioner shows that while it was proceeding to organize the work to complete the contract, Lt. Col. J. N. Hodges, on April 3, 1934, notified P. M. Milner, representing the Continental Casualty Co., that although the terms of the contract just entered into contemplated monthly progress payments, the United States would not make them. (R. 15-16).

13.

Petitioner shows that its attorney, P. M. Milner, notified Lt. Col. J. N. Hodges that it was entitled to partial estimates by Article 16 of the contract, and would not accept this change in the contract terms.

14.

Point 1.

Point 2.

Petitioner shows that the Court of Appeals erred when it held that the letters quoted herein, although by the Stipulation signed by the United States attorney and petitioner's attorney the case was to be decided on the facts evidenced by these letters (R. 52, and particularly page 54, Art. 9), *did not* evidence a meeting of minds, which petitioner assigns as palpable error of law, hence the Surety by this agreement, so says the Court of Appeals, had acquired no rights that could be violated.

And Point 2, that the Court of Appeals erred, as a matter of law, when it held that conceding a contract existed, the action of Lt. Col. J. N. Hodges did not bind the United States because the action was wrongful.

Petitioner shows, as will be pointed out in supporting brief, that the jurisprudence of this Honorable Court is that where the grantee prevents performance, the grantor is excused from performing.

Petitioner shows that, indisputably, by the letters of Lt. Col. J. N. Hodges, Administrative officer, and of the Continental Casualty Co. from March 17, 1934, inclusive of March 28, 1934, as acknowledged by Lt. Col. Hodges to the Trustee in Bankruptcy, March 31, and to P. M. Milner, April 3, there was a meeting of minds and a contract between the United States and the Continental Casualty Co., by which the Continental Casualty Co. agreed to complete the work for 8 cents a cubic yard, with monthly progress payments. These decisions are "*United States v. United Engineering Co., 234 U. S., page 236,*" and "*Anvil Mining Co. v. Humble, 155 United States, page 552,*" which the Court of Appeals failed to follow.

Petitioner shows that the United States Circuit Court of Appeals *ignored* the following decisions of the United States Supreme Court, which decisions regard repudiation and spoliation of citizens with abhorrence:

> *Perry v. United States, 79 L. Ed. 912, 918:* "WHEN the United States with Constitutional Authority, *makes contracts,* it has rights and *incurs responsibilities similar* to those of individuals who are parties to such instruments. There is no difference, said the Court in United States v. Bank of the Metropolis, 15 Pet. 277, 392, 10 L. ed. 774, 779, except that the United States cannot be sued without its consent."
>
> "The United States is as much bound *by its contracts* as are individuals." *Union P. R. Co. v. U. S. (Sinking Fund Cases), 99 U. S. 700.*

"*The same principles* of *right* and *justice* which prevail between *individuals* should *control* in the *construction* and *carrying* out of *contracts* between the Government and individuals." *U. S. v. Utah, N. & C. Co., 199 U. S. 414, 26 Sup. Ct. Rptr. 69.*

"The Supreme Court will apply to contracts made by the Government the same construction and effect as to contracts between individuals." *U. S. v. Smoot (Smoot Cases), 15 Wall. 36.*

"*A Government contract* should be interpreted as are contracts between individuals, with a view of ascertaining the intention of the parties and to give effect accordingly, if that can be done consistently with the terms of the instrument." *Hollerbach v. U. S., 233 U. S. 165, 34 Sup. Ct. Rep.*

"The Government should be animated by a *justice* as anxious to *secure* the *rights* of the *bidder* for its contract as to insist upon its own." *U. S. v. Purcell Env. Co., 249 U. S. 313, 39 Sup. Ct. Rptr. 300.*

15.

Point 3.

Petitioner shows that it had an assignment from the contractor of all of its equipment on the job, and a contractual agreement with the American Bank & Trust Co., who held a chattel mortgage on all of the equipment on the job, and who guaranteed petitioner if it signed Grasser Contracting Company's bond (See Resolution and Letter, R. 87-88) that it would not deprive them of the equipment used on this job until the contract *was completed and accepted.*

16.

Point 3.

Petitioner shows that after receipt of the letter from Lt. Col. J. N. Hodges, April 3, 1934 (R. 68-69) and P. M. Milner's reply thereto (R. 69-70), Mr. Milner, representing the Continental Casualty Co., considered the matter closed, and that the Government would *not make monthly progress payments.* On April 24, 1934, thereafter, the American Bank & Trust Company made a settlement with the Trustee in Bankruptcy and released its Bucyrus Dredges and equipment and sold same to Cralan, Inc., for $60,000. (R. 98-109).

Petitioner shows that from and after April 24, it could not have gone on with the work because it had lost the use of the equipment and two Bucyrus Dredges necessary for the work, but on April 28, too late, because petitioner had lost the Bucyrus Dredges and equipment, and was irreparably injured, Lt. Col. J. N. Hodges sent him a telegram notifying him that they would prepare a supplemental contract, but petitioner shows that this supplemental contract was not forwarded to him until May 10, 1934 (R. 95-98), long after the equipment and Bucyrus Dredges had been released.

17.

Petitioner shows that after Lt. Col. J. N. Hodges, acting within his rights, under Article IX of the contract, quoted herein and in the Court of Appeals' Opinion, *had waived the right of the United States upon termination of the contractor's right to proceed to itself complete the contract, and had waived the right at that time to sub-contract*

the work, in *which event* if either one of these two courses had been pursued, the Surety would have been liable to the Government as a fixed liability for every dollar of excess cost, and after said Lt. Col. Hodges had made a legal and valid contract with the Continental Casualty Co. to complete the work at 8 cents a cubic yard, with monthly progress payments, *it was beyond the power of Lt. Col. Hodges* to re-advertise the contract, which he did, and to award same to Cralan, Inc., at an excess cost of .0289 cents, and to give Cralan & Co., Inc., monthly progress payments and charge the Continental Casualty Co. with $28,963.72 (R. 86) excess cost. Under the contract awarded to the Continental Casualty Company, the United States would have suffered no damages because no matter what it cost the Continental Casualty Co. to complete the work, all the United States would have had to pay was 8 cents per cubic yard, original contract price.

Point 4.

Petitioner assigns this action of Lt. Col. Hodges re-advertising the contract after his formal waiver as illegal and assigns the recognition of this contract with Cralan, Inc., by the Court of Appeals in awarding damages against the Continental Casualty Co. of excess cost of $28,963.72 as error of law.

18.

Point 5.

Petitioner shows the Court that the claim of the United States, upon which suit has been brought (R. 82 and particular page 86) of an item of damages of $14,-479.87, is thoroughly unwarranted, disputed, and illegal,

being so-called Area and District Overhead, alleged cost to the Government, which only could have been charged against the Surety upon the default of the contractor, if the United States had completed the work itself under its options, and petitioner assigns recognition of this claim as error of law by the Court of Appeals.

19.

Point 6.

Petitioner represents that it is of immense importance that the Highest Court in the United States should once and for all time interpret Article 9 of the Standard Form of Contract for Government Work, so that Bidders and Surety Companies signing these bonds should know just exactly the legal effect of terminating the right of the defaulting contractor to proceed with the work, the liability of the Surety on the Bond becoming fixed, upon the United States availing itself of one of the two options reserved to, to-wit: to take over the equipment and complete the work itself, or complete the work by awarding at that time a subcontract surety, in both of which events the surety's liability is fixed and must pay every dollar of cost of completing the work.

Point 7.

Petitioner represents that it is also of momentous importance that this Honorable Court should decide that the Administrative officer under Article 9 of the Standard Form of Government Contract, by way of minimizing damages to the United States, has the right to waive exercising the Government's options and to contract with the Defaulting Contractor's Surety to complete the work accord-

ing to the terms of the contract, and when he has done so, to declare that the contract is a binding legal contract on the part of the United States and cannot be repudiated in defiance of the settled opinions and jurisprudence of this Honorable Court, to be quoted in supporting Brief, and petitioner assigns as error the ruling of the Circuit Court of Appeals, ignoring these authorities.

WHEREFORE, petitioner prays that a Writ of Certiorari issue under the Seal of this Court, directed to the United States Circuit Court of Appeals for the Fifth Circuit, commanding such Court to certify and send to this Court a full and complete transcript of the Record and of the proceedings of the said United States Circuit Court of Appeals for the Fifth Circuit, had in the case numbered and entitled on its docket "No. 9496, Continental Casualty Company, appellant, v. United States of America, appellee," to the end that this cause may be reviewed and determined by this Court as provided for by Section 347 of Title 28, U. S. C. Judicial Code, 240, as amended, and that the judgment herein of the United States Circuit Court of Appeals for the Fifth Circuit be reversed by this Court, and that such other and further relief be had as to this Court may seem proper.

CONTINENTAL CASUALTY COMPANY,

(Seal)

By ROLLIN M. CLARK,
Vice-President,
Petitioner.

PURNELL M. MILNER,
Attorney for Petitioner.

Dated September 5, 1940.